U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 19 July 2006

Case No.: 2004-BLA-6213

In the Matter of:

JULIUS CALDWELL
Claimant

v.

SHAMROCK COAL CO., INC.
Employer

SUN COAL COMPANY, INC.
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

APPEARANCES:

John Hunt Morgan, Esq.
For the Claimant

James M. Kennedy, Esq.
For the Employer/Carrier

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER – DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the "Act"). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a) (2001).

Mr. Julius Caldwell, represented by counsel, appeared and testified at the formal hearing held December 13, 2005 in Hazard, Kentucky. I afforded both parties the opportunity to offer testimony, question witnesses and introduce evidence. Thereafter, I closed the record. I based the following Findings of Fact and Conclusions of Law upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. Although the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformity with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX, EX and CX refer to the exhibits of the Director, Employer and Claimant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Procedural History

Julius Caldwell ("Claimant") filed the instant claim for benefits on April 10, 2001. (DX 2). The District Director denied Claimant benefits on December 16, 2002. (DX 34). Claimant subsequently requested a formal hearing and, on April 11, 2003, the claim was transferred to the Office of Administrative Law Judges. (DX 35, 39). However, the claim was remanded on December 22, 2003, at the request of Employer, to fix errors relating to the designation of the responsible operator. The claim was transferred back to this office on May 12, 2004.

Factual Background

Claimant was born on January 8, 1944, and has a tenth grade education and is married to Eulain Caldwell. (DX 2; Tr. 11, 13). Claimant worked as a welder and repairman during his coal mine employment. (DX 2; Tr. 13). Some of his employment involved working at the mine site and the rest took place at shops away from the mines. (Tr. 13). Claimant asserts that he worked in coal mine employment for seventeen years. (DX 2; Tr. 12).

Claimant testified that he suffers from trouble breathing upon exertion, trouble sleeping due to congestion and productive cough. (DX 19). Claimant stated that he used to smoke a pipe but that he quit around fifteen years ago. (Tr. 14). Dr. Simpao found that Claimant has never smoked; while Dr. Baker noted that Claimant smoked a pipe for twenty years but quit twelve years ago. (DX 14,15). Dr. Dahhan stated that Claimant starting smoking a pipe when he was thirty years old and quit around twelve years ago. (DX 18). Therefore, based on all the evidence of record, I find that the Claimant smoked a pipe for twenty years.

Contested Issues

The parties contest the following issues regarding this claim:

1. Whether the Employer is the properly designated Responsible Operator;

2. The length of Claimant's coal mine employment;

3. Whether Claimant has pneumoconiosis as defined by the Act and the regulations;

4. Whether Claimant's pneumoconiosis, if present, arose out of coal mine employment;

5. Whether Claimant is totally disabled; and

6. Whether Claimant's total disability, if present, is due to pneumoconiosis.

Employer also contests other issues that are identified at line 18(b) on the list of issues. (DX 39). These issues are beyond the authority of an administrative law judge and are preserved for appeal.[1]

Dependency

Claimant alleges one dependent for the purposes of benefit augmentation, namely his wife, Eulain. (DX 2). Claimant and his wife married on May 24, 1967. (DX 12). Claimant testified to his wife's dependency. (Tr. 11). I find that Claimant has one dependent for the purposes of benefit augmentation.

Responsible Operator

Liability is assessed against the most recent operator which meets the requirements at 20 C.F.R. §§ 725.492 and 725.493 (2000) and 20 C.F.R. §§ 725.491-725.494 (2001). 20 C.F.R. § 725.418(c) (2001) requires that the District Director name a responsible operator which is potentially liable for the payment of benefits. Shamrock Coal Co., Inc. ("Employer") has been named the responsible operator in this claim. Section 495 addresses the responsible operator as:

> (a)(1) The operator responsible for the payment of benefits in a claim adjudicated under this part (the "responsible operator") shall be the potentially liable operator, as determined in accordance with Sec. 725.494, that most recently employed the miner.
> (2) If more than one potentially liable operator may be deemed to have employed the miner most recently, then the liability for any

[1] These issues involve the constitutionality of the Act and the regulations. Administrative Law Judges are precluded from ruling on the constitutionality of the Act; therefore, these issues will not be ruled on herein but are preserved for appeal purposes.

benefits payable as a result of such employment shall be assigned as follows:

(i) First, to the potentially liable operator that directed, controlled, or supervised the miner;

(ii) Second, to any potentially liable operator that may be considered a successor operator with respect to miners employed by the operator identified in paragraph (a)(2)(i) of this section; and

(iii) Third, to any other potentially liable operator which may be deemed to have been the miner's most recent employer pursuant to Sec. 725.493.

(3) If the operator that most recently employed the miner may not be considered a potentially liable operator, as determined in accordance with Sec. 725.494, the responsible operator shall be the potentially liable operator that next most recently employed the miner. Any potentially liable operator that employed the miner for at least one day after December 31, 1969 may be deemed the responsible operator if no more recent employer may be considered a potentially liable operator.

(4) If the miner's most recent employment by an operator ended while the operator was authorized to self-insure its liability under part 726 of this title, and that operator no longer possesses sufficient assets to secure the payment of benefits, the provisions of paragraph (a)(3) shall be inapplicable with respect to any operator that employed the miner only before he was employed by such self-insured operator. If no operator that employed the miner after his employment with the self-insured operator meets the conditions of Sec. 725.494, the claim of the miner or his survivor shall be the responsibility of the Black Lung Disability Trust Fund.

(b) Except as provided in this section and Sec. 725.408(a)(3), with respect to the adjudication of the identity of a responsible operator, the Director shall bear the burden of proving that the responsible operator initially found liable for the payment of benefits pursuant to Sec. 725.410 (the "designated responsible operator") is a potentially liable operator. It shall be presumed, in the absence of evidence to the contrary, that the designated responsible operator is capable of assuming liability for the payment of benefits in accordance with Sec. 725.494(e).

(c) The designated responsible operator shall bear the burden of proving either:

(1) That it does not possess sufficient assets to secure the payment of benefits in accordance with Sec. 725.606; or

(2) That it is not the potentially liable operator that most recently employed the miner. Such proof must include evidence that the miner was employed as a miner after he or she stopped working for the designated responsible operator and that the person by whom he or she was employed is a potentially liable operator

> within the meaning of Sec. 725.494. In order to establish that a more recent employer is a potentially liable operator, the **designated responsible operator must demonstrate that the more recent employer possesses sufficient assets to secure the payment of benefits in accordance with Sec. 725.606.**

Although Employer contests the issue of responsible operator, it has failed to present evidence that it is not the properly designated responsible operator. Furthermore, in its post-hearing brief, Employer made no arguments on the issue of responsible operator. The Employer argued before the District Director that Baxter Machine Shop, Darby Construction or R&B Coal Co. should be held liable, but these arguments were not made before the undersigned. (DX 25).

Claimant worked for Employer, Shamrock Coal Co., Inc., between 1979 and 1981. (DX 11). Employer is self-insured through Sun Coal Co., Inc. (DX 11). After leaving Employer, Claimant went to work for R&B Coal Co. Inc. between 1981 and 1982. (DX 11). While working for R&B Coal, Claimant made $9,039.66 in 1981 and $3,691.87 in 1982. When adding these amounts together, it shows that Claimant worked at least 125 days of cumulative employment with R&B Coal. However, there is no evidence in the record stating the actual dates of Claimant's employment with R&B Coal. Therefore, I am unable to determine whether Claimant actually worked a full calendar year with R&B Coal. Also there is no evidence in the record to indicate that R&B Coal has sufficient assets to secure the payment of benefits. Accordingly, Employer has not overcome the presumption that it is the properly designated responsible operator with respect to R&B Coal Co. *Brumley v. Clay Coal Co.*, 6 B.L.R. 1-956, n.2 (1984).

Next, Claimant worked for Nally & Haydon, LLC ("Nally") in 1982. (DX 11). Claimant did not work a full 125 days of employment with Nally. Furthermore, Claimant worked as a welder at a rock quarry during this employment. (DX 5; Tr. 23). Therefore, his work at Nally was not coal mine employment. In 1983, Claimant went to work for Dixie Bridge Co. Inc. (DX 11); however, this work was also not coal mine related. (DX 5; Tr. 24). Claimant left Dixie and went to work for Bon Trucking Co. where he spent all of his time at the shop. (DX 5, 11). He was never at the mine site. An individual must spend a "significant portion" of his time at a coal mine site to meet the situs test. *Musick v. Norfolk & Western Railway Co.*, 6 B.L.R. 1-862 (1984). Therefore, his work is not considered coal mine employment.

In 1985, Claimant went to work for Chaney Creek Coal Corporation. (DX 11). However, he did not work a full 125 days of cumulative employment. (DX 11). Then between 1985 and 1987, he worked for the Harlan County Board of Education. (DX 5, 11; Tr. 24). Claimant worked in the boiler room repairing boilers that burned coal. (Tr. 24). A miner is considered "any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility." 20 C.F.R. § 725.202(a). Accordingly, Claimant was not involved in coal mine employment during his work with the Harlan County Board of Education. Claimant then went to work at a sawmill called New South, Inc. between 1987 and 1990. (DX 5, 11). This work did

not involve the mining of coal in any way. (DX 5). Therefore, New South, Inc. is not a potential responsible operator.

Next, Claimant went to work for Darby Construction Co. ("Darby") between 1989 and 1992. (DX 11). Employer argued to the District Director that Darby should have been named the responsible operator. However, although Claimant worked for Darby over a four year time span, he did not actually work 125 days of cumulative employment or a full calendar year with Darby. (DX 10, 11). On the 125 days scale, Claimant only worked 0.625 years.[2] (DX 11). Claimant worked for Darby November 2, 1989 through May 4, 1990, December 26, 1990 through January 4, 1991, and then June 29, 1992 through June 30, 1992. (DX 10). This does not add up to a full calendar year of employment. Accordingly, Darby is also not a potential responsible operator.

Between 1991 and 1993, Claimant worked for D&B Construction Co. Inc., Jericol Mining Inc., and Cumberland Mine Service Inc. After analyzing his income and the dates of employment, I find that he did not work at least 125 days of cumulative employment with any of these employers. Also there is no evidence in the record to prove that he worked a full calendar year for any of these employers. Therefore, Employer has failed to present evidence to overcome the presumption. None of these employers are potential responsible operators for this claim.

Finally, Claimant's last employment was with Baxter Machine Shop Inc. ("Baxter). (DX 11). Employer has the burden to present evidence that it is not the properly designated responsible operator. When analyzing Claimant's income, the social security records reveal that Claimant's employment with Baxter fulfills the 125 day requirement. However, there is no evidence in the record to indicate the actual calendar dates of employment. Therefore, Employer has failed to prove that Claimant worked for Baxter for one full calendar year.

Even if the evidence were sufficient to prove that Claimant worked a full calendar year for Baxter, there is not enough evidence in the record to prove that Claimant's work with Baxter was coal mine employment. The legislative intent of the Act provides that an individual's exposure to coal dust, which did not occur in or around a coal mining or preparation facility, is not covered by the Act. S.Rep.No. 95-209 95th Cong., 1st Sess. at 20-1 (1977); Conference Re. at H.Rep.No. 95-864, 95th Cong. 2d Sess. at 15 (1978). The focus of the inquiry is whether the intended use of the area of land on which the worker was employed was used for the extraction or preparation of coal. *McKee v. Director, OWCP,* 2 B.L.R. 1-804 (1980); *Bower v. Amigo Smokeless Coal Co.*, 2 B.L.R. 1-729 (1979). Claimant stated in his interrogatories that he was only at the mine site one-third of the time while working for Baxter. (DX 5). He stated that two-thirds of the time he worked in the shop away from the mine. (DX 5). An individual must spend a "significant portion" of his time at a coal mine site to meet the situs test. *Musick v. Norfolk & Western Railway Co.*, 6 B.L.R. 1-862 (1984). I find that the evidence is not sufficient to prove that Claimant spent a significant portion of his time at the mine site while working for Baxter. Therefore, I find that Claimant's work at Baxter was not coal mine employment.

[2] *See* calculations below in the length of coal employment category.

Therefore, after examining all the evidence of record, I find that Employer has not presented sufficient evidence to rebut the presumption that it is the properly designated responsible operator.

Coal Mine Employment

The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. The District Director made a finding of seven years in coal mine employment. (DX 34). Employer stipulated to seven and a-half years at the hearing. However, Claimant argues that he worked seventeen years in coal mine employment. The documentary evidence includes Claimant's Social Security earnings report, an employment questionnaire and a set of interrogatories. (DX 3, 5, 10, 11). The Social Security Earnings report reflects the following coal mine employment earnings history:[3]

Year	Earnings	Industry Average for 125 days of CME	Years of Coal Mine Employment
1973	N/A	$ 5,898.75	0.00
1974	Hop Coal Co. Inc. $ 1,281.63 Tree Top Coal & Equip. Inc. $ 1,118.50 Lee Steel Corp. $ 2,699.25 Total $ 5,099.38	$ 6,080.00	0.84
1975	Lee Steel Corp.[4] $11,412.84	$ 7,405.00	1.00
1976	Lee Steel Corp. $10,009.84 Gold Glow Coals, Inc. 107.25 Total $10,117.09	$ 8,008.75	1.00
1977	Gold Glow Coals Inc. $ 5,625.00 Curtis Allen[5] $ 4,384.50 Total $10,009.50	$ 8,987.50	1.00
1978	Curtis Allen $ 1,705.63 Dollar Branch Coal Co. $ 432.00 Coal Resources Corp. $ 4,806.32 Total $ 6,943.95	$10,038.75	0.69
1979	Dollar Branch Coal Co. $ 198.00 Shamrock Coal Co. Inc. $15,991.24 Total $16,189.24	$10,878.75	1.00
1980	Shamrock Coal Co. Inc. $21,895.85	$10,927.50	1.00
1981	Shamrock Coal Co. Inc. $15,436.48	$12,100.00	1.00

[3] The regulatory provisions at 20 C.F.R. § 725.101(a)(32)(2001) makes reference to a table developed by the *Bureau of Labor Statistics*. However, this table does not exist. Rather, the Department uses a table, which is identified as Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedural Manual*. This table is updated periodically by OWCP. I have used this table above.

[4] Claimant testified at the hearing to working the majority of his time at the mine site. Accordingly, his employment with Lee Steel Corp. is considered coal mine employment.

[5] Claimant testified at the hearing to working at the mine site during his employment with Curtis Allen and therefore, his employment is considered coal mine employment. There is no evidence to suggest that Claimant worked away from the mine site.

	RB Coal Co. Inc. $ 9,039.66 Total $24,476.14		
1982	RB Coal Co. Inc. $ 3,691.87 Nally & Haydon LLC-not coal mine employment	$12,698.75	0.29
1983	Dixie Bridge Co. Inc.-not coal mine employment	$13,720.00	0.00
1984	Bon Trucking Co. Inc.-not coal mine employment.	$14,800.00	0.00
1985	Bon Trucking Co.-not coal mine employment. Chaney Creek Coal Corp. $ 3,064.00 Harlan Co. Bd. of Ed.-not coal mine employment	$15,250.00	0.20
1986	Harlan Co. Bd. of Ed.-not coal mine employment	$15,390.00	0.00
1987	Harlan Col Bd. of Ed.-not coal mine employment. New South, Inc.-not coal mine employment	$15,750.00	0.00
1988	New South, Inc.-not coal mine employment.	$15,940.00	0.00
1989	New South, Inc.-not coal mine employment Darby Construction Co. $ 2,170.39	$16,250.00	0.13
1990	New South, Inc.-not coal mine employment Darby Construction Co. $ 7,152.47	$16,710.00	0.43
1991	Darby Construction Co. $ 431.64 D&B Construction Co. Inc. $ 4,992.25 Total $ 5,423.89	$17,080.00	0.32
1992	Darby Construction Co. $ 661.92 Jericol Mining, Inc. $ 9,520.94 Total $10,182.86	$17,200.00	0.59
1993	Cumberland Mining $15,209.40 Baxter Machine Shop-not coal mine employment	$17,260.00	0.88
1994	Baxter Machine Shop-not coal mine employment	$17,760.00	0.00
		Total	10.37

Accordingly, based upon all the evidence in the record, I find that Claimant was a coal miner, as that term is defined by the Act and Regulations, for 10.37 years. He last worked in the nation's coal mines in 1993. (DX 11).

Medical Evidence

Medical evidence submitted with a claim for benefits under the Act is subject to the requirement that it must be in "substantial compliance" with the applicable regulations' criteria for the development of medical evidence. *See* 20 C.F.R. §§ 718.101 to 718.107. The regulations address the criteria for chest x-rays, pulmonary function tests, physician reports, arterial blood gas studies, autopsies, biopsies and "other medical evidence." *Id.* "Substantial compliance" with the applicable regulations entitles medical evidence to probative weight as valid evidence.

Secondly, medical evidence must comply with the limitations placed upon the development of medical evidence. 20 C.F.R. § 725.414. The regulations provide that a party is limited to submitting no more than two chest x-rays, two pulmonary function tests, two arterial blood gas studies, one autopsy report, one biopsy report of each biopsy and two medical reports as affirmative proof of their entitlement to benefits under the Act. §§ 725.414(a)(2)(i), 725.414(a)(3)(i). Any chest x-ray interpretations, pulmonary function test results, arterial blood gas study results, autopsy reports, biopsy reports and physician opinions that appear in one single medical report must comply individually with the evidentiary limitations. *Id.* In rebuttal to evidence propounded by an opposing party, a claimant may introduce no more than one physician's interpretation of each chest x-ray, pulmonary function test or arterial blood gas study. §§ 725.414(a)(2)(ii), 725.414(a)(3)(ii). Likewise, the District Director is subject to identical limitations on affirmative and rebuttal evidence. § 725.414(a)(3)(i-iii).

A. X-ray Reports[6]

Exhibit	Date of X-ray	Physician/Qualifications	Interpretation
DX 14	4/28/01	Baker/No qualifications	0/1
EX 6	4/28/01	Halbert/B-reader	No abnormalities consistent with pneumoconiosis 0/0
DX 15	6/11/01	Simpao/No qualifications	1/0
DX 19	6/11/01	Wheeler/BCR/B-reader	No abnormalities consistent with pneumoconiosis
DX 18	8/28/01	Dahhan/B-reader	Completely negative
EX 1	6/17/04	Rosenberg/B-reader	No abnormalities consistent with pneumoconiosis 0/0

[6] A chest x-ray may indicate the presence or absence of pneumoconiosis. 20 C.F.R. § 718.102(a) and (b). It is not utilized to determine whether the miner is totally disabled, unless complicated pneumoconiosis is indicated wherein the miner may be presumed to be totally disabled due to the disease.

B. Pulmonary Function Studies[7]

Exhibit/ Date of exam	Physician[8]	Age/ Height	FEV_1	FVC	MVV	FEV_1 / FVC	Tracings	Comments
DX 14 4/28/01	Baker	57/ 72"	3.47	4.60	88	75	Yes	Didn't state cooperation and effort levels
DX 15 6/11/01	Simpao	57/ 71¼"	3.81	4.77	71	80	Yes	Good cooperation and effort
DX 18 8/28/01	Dahhan	57/ 71"	3.40	4.13	56	82	Yes	Good cooperation and effort
EX 1 6/17/04	Rosenberg	60/ 71"	2.84	3.49	46	81	Yes	Fair effort

C. Blood Gas Studies[9]

Exhibit	Date of Exam	Physician	pCO_2	pO_2	Resting/ Exercise
DX 14	4/28/01	Baker[10]	37	75	R
DX 15	6/11/01	Simpao	39.4	74	R
DX 18	8/28/01	Dahhan	38.7	77.1	R
DX 18	8/28/01	Dahhan	36.2	101.1	E
EX 1	6/17/04	Rosenberg	37.2	77	R

[7] The pulmonary function study, also referred to as a ventilatory study or spirometry, indicates the presence or absence of a respiratory or pulmonary impairment. 20 C.F.R. § 718.104(c). The regulations require that this study be conducted three times to assess whether the miner exerted optimal effort among trials, but the Benefits Review Board (the "Board") has held that a ventilatory study which is accompanied by only two tracings is in substantial compliance with the quality standards at § 718.204(c)(1). *Defore v. Alabama By-Products Corp.*, 12 B.L.R. 1-27 (1988). The values from the FEV_1 as well as the MVV or FVC must be in the record, and the highest values from the trials are used to determine the level of the miner's disability.

[8] Matthew A. Vuskovich, M.D. provided a report validating the pulmonary function and arterial blood gas testing performed by Drs. Baker and Simpao. Employer also submitted the deposition testimony of Dr. Vuskovich, who testified that Claimant is not totally disabled. This deposition testimony exceeds the evidentiary limitations to the extent that it discusses other issues besides the validation of the objective testing. Employer has already submitted two medical reports for review, and therefore, the deposition testimony of Dr. Vuskovich is in excess of the evidentiary limitations.

[9] Blood-gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. 20 C.F.R. § 718.105(a).

[10] Dr. Baker's actual arterial blood gas study is not located in the record. (DX 14). He only discusses and documents the results in his report. Therefore, I will not take his study into consideration; however, even if I took the study into consideration it produced nonqualifying results.

D. Narrative Medical Evidence

Glenn Baker, Jr., M.D., examined Claimant on April 28, 2001, at which time he took a patient history of symptoms and recorded an employment history of eighteen years in coal mine employment. (DX 14). Dr. Baker stated that Claimant worked as a welder and repairman. He found that Claimant smoked a pipe for twenty years but quit twelve years ago and has not smoked since. Claimant's symptoms included shortness of breath, dyspnea upon exertion, cough, sputum production, wheezing, and trouble sleeping due to shortness of breath and cough. Dr. Baker performed a chest x-ray, pulmonary function tests, arterial blood gas studies and physical examination on Claimant. Upon examination, Claimant's lungs were clear with no rales or wheezes. (DX 14). Upon reviewing the results of the examination and tests, Dr. Baker diagnosed Claimant with mild resting arterial hypoxemia based on Claimant's arterial blood gas study results. He related the condition to smoking and coal dust exposure. He also diagnosed Claimant with chronic bronchitis based on history and stated that coal dust exposure "may" be a part of the etiology. Dr. Baker also opined that Claimant has a class I impairment based on Table 5-12, page 107, Chapter 5 of *Guides to the Evaluation of Permanent Impairment, 5th Ed.* However, he never stated whether Claimant could perform his regular coal mine employment. (DX 14).

Valentino Simpao, M.D., Board-certified in Internal Medicine and Pulmonary Diseases, examined Claimant on June 11, 2001, at which time he took a patient history of symptoms and recorded an employment history of seventeen years as a surface miner. (DX 15). Dr. Simpao noted Claimant had a history of pleurisy, wheezing, arthritis, allergies, high blood pressure and back and foot injuries. He stated that Claimant had no smoking history. Claimant's symptoms included sputum, wheezing, dyspnea, cough, chest pain, ankle edema, paroxysmal nocturnal dyspnea and orthopnea. In addition, Dr. Simpao performed a physical examination, chest x-ray, pulmonary function tests and arterial blood gas studies. Upon palpation, Dr. Simpao found tactile fremitus, increased right over left. At percussion, he noted increased resonance in the upper chest and axillary areas. Upon auscultation, he found crepitations with occasional forced expiratory wheezes. After reviewing the results of the examination and tests, Dr. Simpao diagnosed Claimant with coal workers' pneumoconiosis 1/0. Dr. Simpao based his opinion on Claimant's coal dust exposure, chest x-ray, arterial blood gas studies, symptomatology and his physical findings. In Dr. Simpao's opinion, Claimant has a mild impairment related to coal dust exposure and does not have the capacity to return to coal mine employment or comparable employment in a dust free environment. He based his opinion on the chest x-ray, arterial blood gas study, symptomatology and the other physical findings in his report. (DX 15).

Abdulkader Dahhan, M.D., Board-certified in Internal Medicine and Pulmonary Diseases, examined Claimant on August 31, 2001, at which time he reviewed the Claimant's symptoms and recorded an occupational history of eighteen years in coal mine employment. (DX 18). Dr. Dahhan noted that Claimant worked as a welder on the surface of the mine. He also stated that Claimant starting smoking a pipe at the age of thirty but quit around twelve years ago. Dr. Dahhan found that Claimant had a history of cough, yellowish sputum production, occasional wheezing, dyspnea on exertion and hypertension. Upon physical examination, Dr. Dahhan noted Claimant's chest showed good air entry to both lungs with no crepitations, rhonchi

or wheezing. Dr. Dahhan also performed a chest x-ray, pulmonary function tests, arterial blood gas studies and an electrocardiogram. He noted the chest x-ray revealed clear lungs with no abnormalities consistent with pneumoconiosis and the pulmonary function tests and arterial blood gas studies were normal. He also examined the other medical evidence in the record. Dr. Dahhan found no evidence of pneumoconiosis and stated that Claimant does not suffer from a pulmonary impairment. He opined that Claimant is capable of performing his last coal mine employment. (DX 18).

David M. Rosenberg, M.D., Board-certified in Internal Medicine and Pulmonary Diseases, examined Claimant on June 17, 2004 and issued a medical report on Claimant's condition on May 5, 2005. (EX 1). Dr. Rosenberg reviewed Claimant's symptoms and recorded an employment history of twenty-one years as a surface mine welder. He found that Claimant smoked a pipe for five years. Dr. Rosenberg recorded that Claimant had a history of shortness of breath (10 years), morning cough, sputum production, wheezing at night and chest pains. Upon physical examination, Dr. Rosenberg found Claimant had equal expansion of his chest without rales, rhonchi or wheezing. He performed a chest x-ray, pulmonary function tests and arterial blood gas studies on Claimant. Dr. Rosenberg opined Claimant's total lung capacity is normal and that Claimant has no restrictions. He stated that Claimant's chest x-ray revealed no evidence of micronodularity associated with coal dust exposure and opined that Claimant does not have pneumoconiosis. Furthermore, Dr. Rosenberg noted that Claimant has no pulmonary impairment and is able to perform his regular coal mine employment. He attributed Claimant's reduced PO_2 levels to obesity. (EX 1). Dr. Rosenberg reiterated his opinions and findings in his December 9, 2005 deposition testimony. (EX 2).

E. Hospital Records and Treatment Notes

The amended regulations provide that, notwithstanding the evidentiary limitations contained at 20 C.F.R. § 725.414(a)(2) and (a)(3), "any record of a miners hospitalization for respiratory or pulmonary or related disease may be received into evidence." 20 C.F.R. § 725.414(a)(4). Furthermore, a party may submit other medical evidence reported by a physician and not specifically addressed under the regulations under Section 718.107, such as a CT scan.

The record includes Claimant's hospital and treatment records from Drs. Chaney and Muchenhausen. (DX 16, 17). None of the records indicate that Claimant suffers from legal or clinical pneumoconiosis, or that he is totally disabled due to pneumoconiosis. The records from Dr. Muchenhausen's office relate solely to Claimant's back and neck injuries. (DX 17). There are a couple of notations stating that Claimant suffered from shortness of breath but the condition is never related to coal dust exposure. (DX 17). Dr. Muchenhausen states that Claimant is permanently and totally disabled, but she is only referring to Claimant's neck and back condition, not his pulmonary condition. (DX 17). The records from Dr. Chaney state that Claimant suffers from chronic shortness of breath, but Dr. Chaney never relates the condition to coal dust exposure. (DX 16). Accordingly, the hospital and treatment records submitted have no effect on the outcome of this claim.

DISCUSSION AND APPLICABLE LAW

Because Claimant filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. Under this part of the regulations, Claimant must establish by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. § 725.202(d)(2)(i-iv). Failure to establish any of these elements precludes entitlement to benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989).

Pneumoconiosis and Causation

Section 718.202 provides four means by which pneumoconiosis may be established: chest x-ray, biopsy or autopsy, presumption under Sections 718.304, 718.305 or 718.306, or if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in Section 718.201. 20 C.F.R. § 718.202(a). The regulatory provisions at 20 C.F.R. § 718.201 contain a definition of "pneumoconiosis" provided as follows:

> (a) For the purposes of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical," pneumoconiosis and statutory, or "legal," pneumoconiosis.
>
> (1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

§ 718.201(a).

It is within the administrative law judge's discretion to determine whether a physician's conclusions regarding pneumoconiosis are adequately supported by documentation. *Lucostic v. United States Steel Corp*., 8 B.L.R. 1-46, 1-47 (1985). "An administrative law judge may properly consider objective data offered as documentation and credit those opinions that are adequately supported by such data over those that are not." *See King v. Consolidation Coal Co*., 8 B.L.R. 1-262, 1-265 (1985).

A. X-ray Evidence

Under Section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. Because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(*en banc*); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). As noted above, I also may assign heightened weight to the interpretations by physicians with superior radiological qualifications. *See McMath v. Director, OWCP,* 12 B.L.R. 1-6 (1988); *Clark*, 12 B.L.R. 1-149 (1989).

The chest x-rays in the record do not support a finding of pneumoconiosis. Both Dr. Baker and Dr. Halbert, a B-reader, found the April 28, 2001 x-ray film negative for pneumoconiosis. Dr. Simpao read the June 11, 2001 film as positive for pneumoconiosis; however, Dr. Wheeler, a Board-certified radiologist and B-reader, read the film as negative. Due to Dr. Wheeler's superior qualifications, I find this x-ray negative. Drs. Rosenberg and Dahhan, both B-readers, respectively found the August 28, 2001 and June 17, 2004 x-ray films negative for pneumoconiosis. Accordingly, I find the preponderance of negative x-ray readings outweigh the positive readings. Therefore, pneumoconiosis has not been established under Section 781.202(a)(1).

B. Autopsy/Biopsy

Pursuant to Section 718.202(a)(2), a claimant may establish the existence of pneumoconiosis by biopsy or autopsy evidence. As no biopsy or autopsy evidence exists in the record, this section is inapplicable in this case.

C. Presumptions

Section 718.202(a)(3) provides that it shall be presumed that the miner is suffering from pneumoconiosis if the presumptions described in Sections 718.304, 718.305, or 718.306 are applicable. Section 718.304 is not applicable in this case because there is no evidence of complicated pneumoconiosis. Section 718.305 does not apply because it pertains only to claims that were filed before January 1, 1982. Finally, Section 718.306 is not relevant because it is only applicable to claims of miners who died on or before March 1, 1978.

D. Medical Opinions

Section 718.202(a)(4) provides another way for a claimant to prove that he has pneumoconiosis. Under Section 718.202(a)(4), a claimant may establish the existence of the disease if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that he suffers from pneumoconiosis. Although the x-ray evidence is negative for pneumoconiosis, a physician's reasoned opinion might support the presence of the disease if it is supported by adequate rationale, not withstanding a positive x-ray interpretation. *See Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85, 1-89 (1993); *Taylor v. Director, OWCP*, 9 B.L.R. 1-22, 1-24 (1986). The weight given to a medical opinion will be in proportion to its well-documented and well-reasoned conclusions.

A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 B.L.R. 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984); *Buffalo v. Director*, OWCP, 6 B.L.R. 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp*., 2 B.L.R. 1-130 (1979).

A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(*en banc*).

Dr. Baker opined that Claimant does not suffer from clinical pneumoconiosis. (DX 14). He based his opinion on the chest x-ray data. I find his clinical pneumoconiosis opinion well-reasoned and well-documented. However, Dr. Baker diagnosed Claimant with chronic bronchitis which he based on Claimant's history. However, to constitute legal pneumoconiosis, the condition must be related to coal dust exposure. Dr. Baker stated that Claimant's coal dust exposure "may" be part of the etiology of Claimant's chronic bronchitis. An opinion may be given little weight if it is equivocal or vague. *Island Creek Coal Co. v. Holdman*, 202 F.3d 873 (6th Cir. 2000); *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91 (1988) (an equivocal opinion regarding etiology may be given less weight). Accordingly, I give Dr. Baker's legal pneumoconiosis opinion less weight.

Dr. Simpao's report concluded Claimant suffers from clinical pneumoconiosis. (DX 15). He bases his opinion on Claimant's multiple years of coal dust exposure, chest-ray and other physical findings and symptomatology. Dr. Simpao fails to explain how his other physical findings and Claimant's symptomatology provide a basis for a diagnosis of pneumoconiosis. Also Dr. Simpao's findings are not supported by the evidence in the record and he made no legal pneumoconiosis findings. . Therefore, I find Dr. Simpao's report unreasoned and I give it little weight. [11]

[11] The District Director is required to provide each miner applying for benefits with the "opportunity to undergo a complete pulmonary evaluation at no expense to the miner." § 725.406(a). A complete evaluation includes a report

In contrast, Dr. Dahhan's report concluded Claimant does not have pneumoconiosis. (DX 18). Dr. Dahhan based his opinion on the chest x-ray evidence and Claimant's normal pulmonary function and arterial blood gas studies. The preponderance of the evidence supports Dr. Dahhan's opinion. I find that Dr. Dahhan's medical report is well-reasoned and well-documented regarding pneumoconiosis.

Dr. Rosenberg's report also concluded that Claimant does not have pneumoconiosis. (EX 1). He reviewed all the medical evidence of record in forming his conclusions. Dr. Rosenberg opined Claimant's lung capacity is normal. To support his opinion, Dr. Rosenberg notes upon examination Claimant's total lung capacity and volumes were normal, his lungs were normal on auscultation and his chest x-ray did not reveal micronodularity. Dr. Rosenberg's opinions are consistent with the probative chest x-ray evidence of record. He further explained his findings in his December 9, 2005 deposition. (EX 2). I find that Dr. Rosenberg's medical report is well-reasoned and well-documented regarding pneumoconiosis.

I have considered all the evidence under Section 718.202(a); and I find the probative negative x-ray reports and the more complete, comprehensive and better supported medical opinion reports of Drs. Rosenberg, Dahhan, and Baker outweigh the unreasoned medical report of Dr. Simpao on the issue of clinical pneumoconiosis. The reports of Drs. Rosenberg and Dahhan also outweigh the report of Dr. Baker on the issue of legal pneumoconiosis. Thus, I find Claimant has failed to demonstrate, by a preponderance of the evidence, the existence of pneumoconiosis.

Causation of Pneumoconiosis

Once it is determined that a claimant suffers from pneumoconiosis, it must be determined whether the claimant's pneumoconiosis arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). The burden is upon Claimant to demonstrate by a preponderance of the evidence that his/her pneumoconiosis arose out of his coal mine employment. 20 C.F.R. § 718.203(b) provides:

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of the physical examination, a chest x-ray, a pulmonary function study, and an arterial blood gas study. Reviewing courts have added to this burden by requiring the pulmonary evaluation be sufficient to constitute an opportunity to substantiate a claim for benefits. *See Petry v. Director*, OWCP 14 B.L.R. 1-98, 1-100 (1990)(*en banc*); *see also Newman v. Director*, OWCP, 745 F.2d 1161 (8th Cir. 1984); *Prokes v. Mathews*, 559 F.2d 1057, 1063 (6th Cir. 1977).

In this Decision and Order, I have found that Claimant's complete pulmonary evaluation by Dr. Simpao is unreasoned for purposes of determining pneumoconiosis as noted above. However, even if Dr. Simpao's opinion was well-reasoned and well-documented, I would not have found that Claimant suffers from pneumoconiosis. The preponderance of the evidence reveals that Claimant does not suffer from pneumoconiosis and is not totally disabled. As a result, even if this claim were remanded to the Director to provide a reasoned and documented opinion concerning the existence of pneumoconiosis, Claimant could not prevail. Therefore, I find that remand of this case would be futile. *Larioni v. Director, OWCP*, 6 B.L.R. 1-1276 (1984); *see*, *e.g.*, *Mullins v. Director, OWCP*, No. 05-0295 BLA (BRB, Jul. 27, 2005)(unpub.); *Bowling v. Director, OWCP,* No. 05-0327 BLA (BRB, Jul. 29, 2005)(unpub.).

> If a miner who is suffering or has suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arouse out of such employment.

Id.

Since I have found that Claimant failed to prove that he has pneumoconiosis, the issue of whether pneumoconiosis arose out of his employment in the coal mines is moot.

Total Disability

The determination of the existence of a totally disabling respiratory or pulmonary impairment shall be made under the provisions of Section 718.204. A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b)(1). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. *See Beatty v. Danri Corp.*, 16 B.L.R. 1-11, 1-15 (1991). A claimant can be considered totally disabled if the irrebuttable presumption of Section 718.304 applies to his claim. If, as in this case, the irrebuttable presumption does not apply, a miner shall be considered totally disabled if in absence of contrary probative evidence, the evidence meets one of the Section 718.204(b)(2) standards for total disability. The regulation at Section 718.204(b)(2) provides the following criteria to be applied in determining total disability: 1) pulmonary function studies; 2) arterial blood gas tests; 3) a cor pulmonale diagnosis; and/or, 4) a well-reasoned and well-documented medical opinion concluding total disability. Under this section, I must first evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike evidence, to determine whether claimant has established total respiratory disability by a preponderance of the evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1987).

A. Pulmonary Function Tests

Under Section 718.204(b)(2)(i) total disability may be established with qualifying pulmonary function tests.[12] To be qualifying, the FEV_1 as well as the MVV or FVC values must equal or fall below the applicable table values. *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984). I must determine the reliability of a study based upon its conformity to the applicable quality standards, *Robinette v. Director, OWCP*, 9 B.L.R. 1- 154 (1986), and must consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). In assessing the reliability of a study, I may accord greater weight to the opinion of a physician who reviewed the tracings. *Street v. Consolidation Coal Co.*, 7 B.L.R. 1-65 (1984). Because tracings are used to determine the reliability of a ventilatory study, a study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). If a study is accompanied by three tracings, then I may presume

[12]A qualifying pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(b)(2)(i) and (ii). A non-qualifying test produces results that exceed the table values.

that the study conforms unless the party challenging conformance submits a medical opinion in support thereof. *Inman v. Peabody Coal Co.*, 6 B.L.R. 1-1249 (1984). Also, little or no weight may be accorded to a ventilatory study where the miner exhibited poor cooperation or comprehension. *See, e.g., Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984).

All the pulmonary function tests of record produced non-qualifying values. Accordingly, I find per Section 178.204(b)(2)(i), Claimant has failed to establish total disability.

B. Blood Gas Studies

Under Section 718.204(b)(2)(ii) total disability may be established with qualifying arterial blood gas studies. All blood gas study evidence of record must be weighed. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise. *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984). In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner or circumstances surrounding the testing affected the results of the study and, therefore, rendered it unreliable. *Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984) (miner suffered from several blood diseases); *Cardwell v. Circle B Coal Co.*, 6 B.L.R. 1-788 (1984) (miner was intoxicated).

All of the arterial blood gas studies produced non-qualifying values. Accordingly, I find Claimant has not proven total disability under Section 718.204(b)(2)(ii).

C. Cor Pulmonale

There is no medical evidence of cor pulmonale in the record, I find Claimant failed to establish total disability with medical evidence of cor pulmonale under the provisions of Section 718.204(b)(2)(iii).

D. Medical Opinions

The final way to establish a totally disabling respiratory or pulmonary impairment under Section 718.204(b)(2) is with a reasoned medical opinion. The opinion must be based on medically acceptable clinical and laboratory diagnostic techniques. *Id*. A claimant must demonstrate that his respiratory or pulmonary condition prevents him from engaging in his "usual" coal mine employment or comparable and gainful employment.
20 C.F.R. § 718.204(b)(2)(iv).

The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions. In assessing total disability under Section 718.204(b)(2)(iv), the administrative law judge, as the fact-finder, is required to compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Budash v. Bethlehem Mines Corp.*, 9 B.L.R. 1-48, 1-51 (holding medical report need only describe either severity of impairment or physical effects imposed by claimant's respiratory impairment sufficiently for administrative law judge to infer that claimant is totally disabled). Once it is demonstrated that the miner is unable to perform his or her usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears

the burden of going forth with evidence to demonstrate that the miner is able to perform comparable and gainful work pursuant to Section 718.204(c)(2). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

The physicians' reports are set forth above. Dr. Simpao found that Claimant suffers from a mild pulmonary impairment which prevents him from being able to perform his last coal mine employment. (DX 15). He based his opinion on Claimant's chest x-ray, arterial blood gas study, symptomatology and other physical findings in his report. However, Dr. Simpao failed to explain how he came to his conclusion despite the non-qualifying objective testing. He also failed to explain how a mild impairment totally disabled Claimant. Dr. Simpao failed to apply Claimant's exertional requirements of his last coal mine employment to his physical limitations. Dr. Simpao never stated what Claimant's last coal mine employment involved. Therefore, I give little weight to Dr. Simpao's opinion.

Dr. Baker opined that Claimant suffers from a class I impairment. (DX 15). However, he never opined whether Claimant could perform his regular coal mine employment. Therefore, I give no weight to Dr. Baker's total disability opinion.

Dr. Dahhan found no evidence of a pulmonary impairment. (DX 18). He opined that Claimant has the respiratory capacity to perform his regular coal mine employment. Dr. Dahhan's opinions are consistent with the probative pulmonary function tests and arterial blood gas studies of record. I find that his opinion is supported by the evidence of record, and it is well-reasoned and well-documented on the issue of total disability.

Dr. Rosenberg also opines that Claimant does not suffer from a pulmonary impairment. (EX 1). He stated that Claimant has the pulmonary ability to perform his previous coal mine employment or other similarly arduous types of labor. He bases his opinion on his own examination and the results of the objective medical testing. Dr. Rosenberg stated Claimant's pulmonary function tests and arterial blood gas studies revealed values and data which demonstrate normal functions and diffusing capacity, and revealed no restrictions. He found Claimant had a normal total lung capacity. Dr. Rosenberg's opinions are consistent with the probative pulmonary function tests and arterial blood gas studies of record. He also took into consideration the findings of other physicians on examination and testing. Dr. Rosenberg based his opinions on a more complete consideration of Claimant's current status regarding the results on pulmonary tests and arterial blood gas studies. I find that Dr. Rosenberg's medical report is well-reasoned and well-documented regarding total disability.

I have considered all the evidence under Section 718.204(b)(2)(iv), and I find the more complete, comprehensive and better supported medical opinion reports of Drs. Rosenberg and Dahhan outweigh the unreasoned medical reports of Drs. Simpao and Baker. Thus, I find Claimant has not established total disability by the probative medical opinion reports of record under the provisions of Subsection 718.204(b)(2)(iv).

E. Overall Total Disability Finding

Upon consideration of all of the evidence of record, Claimant has not established, by a preponderance of the evidence, total disability. Accordingly, I find Claimant has not established total disability under the provisions of Section 718.204(b).

Total Disability Due to Pneumoconiosis

Since I have found Claimant failed to prove total disability, the issue of whether total disability is due to pneumoconiosis is moot.

ENTITLEMENT

Based on the findings in this case, Claimant has not met the conditions of entitlement. Claimant has not established the presence of pneumoconiosis, that such pneumoconiosis arose out of his coal mine employment or that he is totally disabled due to pneumoconiosis. Therefore, Mr. Caldwell's claim for benefits under the Act shall be denied.

Attorney's Fees

The award of attorney's fees, under this Act, is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the claimant for the representation services rendered to him in pursuit of the claim

ORDER

IT IS HEREBY ORDERED that the claim of Julius Caldwell for benefits under the Black Lung Benefits Act is hereby DENIED.

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JOSEPH E. KANE
Administrative Law Judge

Notice of Appeal Rights: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with Board within thirty (30) days from the date of which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* C.F.R §802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).